

No. 13-20-00287-CR
No. 13-20-00288-CR

FILED IN
13th COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS

IN THE COURT OF APPEALS
4/6/2021 8:00:00 AM
KATHY S. MILLS
Clerk
FOR THE STATE OF TEXAS

THIRTEENTH JUDICIAL DISTRICT

Ex parte
Krisean Jamon Gibson (K.G.)

On Appeal from the 19th District Court
Of McLennan County, Texas in Cause Numbers
2020-555-C1A & 2020-555-C1B

APPELLANT'S POST-SUBMISSION BRIEF

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TO THE HONORABLE COURT OF APPEALS

Appellant, Krisean Gibson, submits this post-submission brief to include the two COVID-era cases that were argued and referenced that were not included in the briefing in this case. Gibson files this brief to address those cases and to respond to the State's post-submission brief.

The State's post-submission brief cited to *Clay v. State*, 382 S.W.3d 465 (Tex. App. – Waco 2012), aff'd, 391 S.W.3d 94 (Tex. Crim. App. 2013), for the “proposition that although many procedures are typically done in person, where there is no physical presence requirement in the Constitution or Statute utilizing technology is appropriate and that the law should retain flexibility in the face of technological advances.” The issue in *Clay* was whether an affidavit filed in support of a search warrant must be upon an oath administered by a person authorized to take an oath in a face-to-face meeting with the affiant. *Id.* at 466. The Court should not find these situations comparable or persuasive.

In *Haggard v. State*, 612 S.W.3d 318, 329-30 (Tex. Crim. App. 2020), the Court of Criminal Appeals held that the testimony of a sexual assault nurse

examiner via two-way visual social media platform did not further important public interest, for purposes of determining whether testimony violated defendant's Sixth Amendment right of confrontation. Although a defendant's right to confront his accuser(s) and his right to be indicted by a quorum of a grand jury has its important differences, its common is its constitutional nature. For this reason, Appellant suggests this Court should be guided by the Court of Criminal Appeals more recent decision in *Haggard* than *Clay*.

As to the State's position on waiver, Appellant respectfully suggests that the State is conflating claim waiver (or preservation) with claim forfeiture. However, neither apply. Appellant's discussion about *Ex parte De Paz*, 2016 WL 3765751 (Tex. App. — Austin July 7, 2016, no pet.) (not designated for publication) and *Ex parte Shaw* 2012 WL 6632926 (Tex. App. — Ft. Worth Dec. 21, 2012) (not designated for publication) was in response to the State's argument on its counter-issue supporting the trial court's judgment. The Texas Supreme Court has forbidden appellate courts from reversing a trial court's judgment based on unassigned error (i.e., a

ground not presented in the appellate briefs, a counter-issue or reply issue does not allege error). *Martin v. Martin*, 363 S.W.3d 221, 228 (Tex. App. — Texarkana 2012). Because an appellate court can affirm on any legally correct theory, the State was welcome to address counter-issues supporting the trial court's judgment (i.e., alternative reasons to affirm the trial court, even if they are raised for the first time at oral argument). See *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 478 n.6 (Tex. App. — Houston [1st Dist.] 2006, pet. denied). "It is irrelevant, however, that [appellee] failed to address the [] claims in its brief, as an appellee need not raise cross-points or even file a brief to have this Court consider what was presented to the trial court; the burden rests on the appellant to establish grounds for reversal." *Id.* Appellant did just this: addressed the newly framed and raised counter-issue by the appellee.

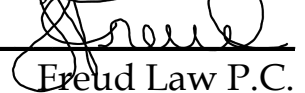
Finally, during argument, Appellant cited to *Lira v. State* 2021 WL 1134801 (Tex. App. — Eastland March 25, 2021, pet. pend'ng) (not designated for publication) for the important discussion regarding the substantive versus procedural rights to which an emergency order applies.

Ex parte Tucker, 2020 WL 7776448 (Tex. App.—Austin Dec. 31, 2020, no pet.) (not designated for publication) was similarly discussed because of its relevance to Appellant’s challenges to the local standing order and misapplication of Government Code Section 22.0035(b) (e.g., grand jury meetings are not “court proceedings” within the meaning of this section of the government code and so the emergency order did not apply or authorize virtual grand juror participation).

Accordingly, Appellant prays the Court grant him the relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Post-Submission Brief was emailed to Sterling.Harmon@co.mclennan.tx.us and/or Gabe.Price@co.mclennan.tx.us of the District Attorney's Office of McLennan County, Texas, on April 5, 2021.



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